

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 July 2024

**Public Authority:** Financial Conduct Authority  
**Address:** 12 Endeavour Square  
London  
E20 1JN

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about ongoing investigations. The above public authority ("the public authority") provided some information, stated that some information was not held, relied on section 31 of FOIA (law enforcement) to withhold some information and relied on section 12 of FOIA (costs) to refuse part of the request.
2. The Commissioner's decision is that the public authority was entitled to rely on section 31 of FOIA and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps to be taken.

#### **Request and response**

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4. On 10 November 2023, the complainant wrote to the public authority and made a request for information, containing multiple parts, that broadly related to action the public authority had taken or was intending to take to deal with so-called "greenwashing." In the interests of brevity, the Commissioner has not included the request in its entirety. Instead he has reproduced only those sections relevant to the analysis contained in this decision notice:

"Please provide, in relation to climate (including greenwashing):

- 1.1. the number of active FCA Enforcement investigations (specifying those undertaken in cooperation with overseas regulators) and the start date of each;
  - 1.2. the number of active Supervision matters, both in relation to disclosure rules and wider consumer and market harms, or if this information is not available an outline of the current ESG work of Supervision as it is categorised and measured by the FCA;
  - 1.3. of the active Enforcement investigations identified in 1.1 above, the number of investigations focussed on: (i) asset owners, (ii) asset managers, (iii) banks, (iv) financial advisers, (v) insurers, (vi) other firms, and (vii) individuals.”
5. On 11 December 2023, the public authority responded. It provided some information, relied on section 31 of FOIA to withhold some information, relied on section 12 (costs) to refuse part of the request and denied holding the remaining information.
  6. Following an internal review the public authority wrote to the complainant on 7 June 2024. It disclosed all the information it had previously relied on section 31 of FOIA to withhold – with the exception of part 1.3. It maintained its position in respect of the remaining elements of the request.

## **Scope of the case**

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7. The complaint was submitted prior to the public authority completing its internal review. In view of the fact that the public authority had already breached the guidance set out in the section 45 FOIA Code of Practice, the Commissioner accepted the complaint immediately.
8. After the internal review was completed, the complainant contacted the Commissioner on 21 June 2024 to set out the outstanding matters she wished the Commissioner to look at. These were:
  - the reliance on section 31 of FOIA; and
  - the delay in completing the internal review.
9. The Commissioner has limited the scope of his investigation to these matters. Following the internal review, part 1.3 of the original request is the only part that remains in dispute.

## Reasons for decision

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10. Section 31 of FOIA allows a public authority to withhold information whose disclosure could affect the ability of a regulator to regulate effectively.
11. The public authority has already confirmed that only one investigation of the type specified in part 1.1 of the request is currently underway. The remaining withheld information relates to the nature of the investigation being carried out. Specifically, it would reveal the nature of the person that was being investigated.
12. Given that this part of the request could cover either an individual or a company (and the complainant wants to establish which), so as to avoid revealing information that has been withheld, for the purposes of this notice, the Commissioner will use the broader legal definition of the word "person." This definition includes both a "natural" person (ie. a human being) and a "legal" person (such as a company).
13. In this case, the public authority is itself the potentially-affected regulator. It has various functions and powers which derive primarily from the Financial Services and Markets Act 2000 and associated legislation.
14. Whilst the public authority has identified to the Commissioner the specific statutory function being exercised, he will not record that in this notice. This is because the public authority has argued (and the Commissioner accepts that) identifying the specific function would provide a clue as to the nature of the investigation – which is precisely what the public authority is aiming to protect.
15. The public authority has argued that its ability to discharge this function (and its functions as a regulator more generally) would be harmed by the disclosure of this information.
16. Disclosure of the information would, the public authority argued, lead to the identification of the person who was under investigation. It provided the Commissioner with some further explanation as to why this was the case.
17. The public authority explained that:

“In the interests of fairness, the FCA considers that the conduct of those it regulates should generally remain private unless and until a final decision to take formal enforcement action after an investigation is concluded has been reached and that even then it should not publish information if to do so would be “unfair”...

“Disclosure of the requested information, and the resulting potential identification of [the person] under investigation, would be regarded as undermining the fairness of the enforcement process, which would impact on the co-operation of [person]s with the investigation procedure. In turn, this would hamper the effective discharge of the enforcement function, especially given [their] expectation that the FCA does not customarily publish details about an investigation or regulatory action except in exceptional circumstances.

“We are concerned that disclosure of the withheld information could impact on the flow of information the FCA receives as part of its role as the UK’s financial regulator. The Information Commissioner understands that a regulatory body will be dependent on its communications to and from the bodies that it regulates, other third parties and the public generally, being full and frank in nature so that it can effectively provide advice, investigate and consider any abuses of its regulatory requirements. The Commissioner has previously recognised and allowed the argument which says that disclosure could have a prejudicial effect where it could slow down a public authority’s regulatory process and may lead to less timely regulatory action.”

18. The public authority explained that, disclosing information in an ad hoc fashion could, in the particular circumstances, be likely to:

“lead to comment and speculation which, in the absence of any further background information, could be taken out of context and could lead to the wrong conclusions being drawn in respect of our decision-making processes, [who] we are investigating, and why.”

### **The Commissioner’s view**

19. The Commissioner is satisfied that the exemption is engaged.
20. The public authority has already confirmed that there is only a single investigation of the broad type referred to in the request. Providing further, more granular information about the nature of that investigation or the person being investigated, will always provide a greater risk of revealing the specific nature of the investigation and the identity of the person being investigated.
21. The public authority has provided the Commissioner with more detailed reasoning about the level of risk of identification in this case. The Commissioner cannot reveal this in a published decision but he is satisfied that, in the circumstances, identification is more probable than not.
22. Being the subject of a regulatory investigation is not the same as having breached the law. Revealing that a particular person is under

investigation risks damaging their reputation even though they may have done nothing wrong. The rapid pace at which financial markets work mean that severe damage can occur very quickly.

23. The Commissioner accepts that revealing details of persons under investigation would reduce the willingness of those persons to co-operate with the public authority – making it more difficult for the public authority to regulate effectively.
24. When a person is accused of breaking the law, they tend to become defensive and aim to protect their public reputation. This doesn't prevent regulators from getting to the truth, but it does make the process more difficult if the subject of the investigation will cooperate only if they are compelled to do so and to the minimum extent required by law.
25. The Commissioner is therefore satisfied that, for the reasons the public authority has set out above, disclosing the withheld information would prejudice the public authority's ability to regulate effectively.

### **Public interest test**

26. Information which would undermine regulators must still be disclosed unless the balance of the public interest favours maintaining the exemption.
27. The complainant argued that there was a strong public interest in transparency. She pointed out that the public authority had been specifically asked, by the Government, to consider the Government's net-zero commitments when performing its functions as a regulator. The public authority had, in turn, set out a dedicated Environmental, Social and Governance (ESG) strategy for firms offering investment opportunities in this area and its chief executive had written to an industry body in 2021 setting out concerns about the way such products were being marketed.
28. Given this apparent focus, the complainant argued, it was important for the public to know how the public authority was backing up its words with actions. There was a public interest in understanding how effectively regulators are regulating.
29. The complainant also pointed out that the public authority was currently consulting on the extent of information it should share about current investigations – which would suggest that the public authority itself was both aware that it could be more transparent and that transparency could be used as a regulatory tool in itself.

30. Finally, in relation to the public authority's concerns about "partial" information being released, she argued this was an argument for more, not less, transparency.
31. The Commissioner recognises the public interest in transparency. ESG appears to be a fast growing market and one which may well attract investors who are new to investing. There is a strong public interest in ensuring that the products being offered meet appropriate standards and that the industry regulator takes appropriate action to deal with rogue traders.
32. However, in this case the Commissioner is satisfied that the public interest has largely been met already by the public authority disclosing the **total** number of investigations it is carrying out in this particular market.
33. There will be those who think the public authority should be carrying out more investigations – and possibly some who think it should carry out fewer such investigations – but that is a debate that can already be had based on the information already in the public domain.
34. In the Commissioner's view, revealing the person under investigation (because that would be the consequence of disclosure) would not advance that debate significantly. However, it would result in the negative consequences – both to that person and to the regulator more generally – set out above.
35. The Commissioner is therefore persuaded that, in the circumstances of this case, the public interest favours maintaining the exemption.
36. During the course of his investigation, given the nature of the request, the Commissioner did give thought to the question of whether the requested information would be environmental. In his view, were the information to be environmental, it would be exempt under regulation 12(5)(b) of the EIR (course of justice) for the same reasons that section 31 of FOIA applies. Rather than requiring a detailed explanation of the nature of the investigation and the person under investigation (which would go well beyond the information being withheld) to determine how closely the information was linked to the elements of the environment, the Commissioner has accepted the public authority's assurance that the information is not environmental.

## **Other matters**

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37. The Commissioner notes that it took the public authority five months to complete its internal review – despite 40 working days being the recommended deadline in the FOIA Code of Practice. The Commissioner considers this delay to represent poor practice.

## Right of appeal

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38. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

## Signed

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**